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REPORT TO THE LEGISLATURE

Sunset Review

COMMISSION FOR HUMAN RIGHTS

The 1977 Sunset Law terminates the Commission on July 1, 1981. This review provides information to assist the Legislature in making the decision to continue or modify the Commission.

This report presents eight areas for Legislative consideration (page 35) including:

- ▶ Effect of commission termination
- ▶ Overlapping authority and potential consolidation
- ▶ Low priority functions
- ▶ Increasing pending cases
- ▶ Agreements with federal agencies

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September 1980

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The Legislative Audit Committee
of the Montana State Legislature:

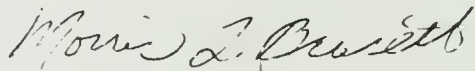
Herein transmitted is our sunset performance review of the Montana Commission for Human Rights. The review was conducted in response to the 1977 Sunset Law, which terminates the commission on July 1, 1981.

The review focused upon an examination of operations of the commission and the Human Rights Division which carries out commission policy. It does not encompass an audit of the commission's financial transactions or overall compliance with state laws.

There are no formal recommendations in the report since the responsibility for such recommendations lies with the Audit Committee. Nevertheless, we discussed the contents of the report with a number of individuals and organizations, including the members of the Commission for Human Rights, the Human Rights Division staff, the Commissioner of the Department of Labor and Industry, the Governor's Office of Budget and Program Planning, the Department of Administration, and various private organizations.

We wish to express our appreciation to the members of the commission and to the division staff for the assistance they provided during the review. We also wish to thank the various organizations for assistance they gave us.

Respectfully submitted,

A handwritten signature in cursive script, reading "Morris L. Brusett".

Morris L. Brusett, C.P.A.
Legislative Auditor

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APPOINTIVE AND ADMINISTRATIVE OFFICIALS

COMMISSION FOR HUMAN RIGHTS

		<u>Term Expires</u>
Karen Townsend Chairperson	Missoula	1981
Peg Krivec	Billings	1981
John Frankino	Helena	1983
Roberta Ferron	Bozeman	1983
Daniel Ramirez	Butte	1983

DEPARTMENT OF LABOR AND INDUSTRY

David E. Fuller	Commissioner
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HUMAN RIGHTS DIVISION

Raymond D. Brown	Administrator
Frederick F. Sherwood	Staff Attorney

Chapter I

BACKGROUND

This sunset performance review addresses the operation of the Montana Commission for Human Rights and the work of the Human Rights Division of the Department of Labor and Industry to prevent and eliminate discrimination in Montana.

REPORT OBJECTIVES

The 1977 Legislature enacted legislation terminating numerous boards and agencies, including the Commission for Human Rights. This law, commonly referred to as the "sunset law," requires the Legislative Audit Committee to conduct a performance review of each terminated agency. The performance review must objectively examine the need for each board/agency and the Legislative Audit Committee must offer recommendations for reestablishment, modification, or termination.

Using the information contained in this report, and that gathered during a public hearing, the committee will address the issue of agency reestablishment, modification or termination. During the hearing process, testimony and comments will be received from the commission/division and interested members of the public.

In defining legislative intent, the sunset law states that, by requiring periodic evaluation in the

form of a performance review, the legislature will be in a better position to ensure that agencies and their programs exist only to be responsive to state residents' needs. The sunset law terminates the Commission for Human Rights on July 1, 1981. This sunset report is in response to the legal requirement for a review prior to the agency's termination.

Chapter II

COMMISSION FOR HUMAN RIGHTS

INTRODUCTION

The Commission for Human Rights was created by the 1974 Legislature to enforce Montana laws against discrimination. Title 49, Chapter 2, MCA, known as the Human Rights Act, was enacted to protect Montana citizens' rights to be free from discriminatory practices. The law was passed in response to a national trend in which 40 states established similar commissions to protect citizens' rights and to comply with federal anti-discrimination statutes. The law also implemented Article II, Section 4 of Montana's new constitution adopted in 1972. The Montana act prohibits discrimination based on race, creed, religion, color, sex, physical or mental handicap, age, national origin, marital status, or political beliefs.

In 1975, the Legislature passed a supplement to the Human Rights Act, entitled the Governmental Code of Fair Practices. These statutes (Title 49, Chapter 3, MCA), known as the Fair Practices Act, clarify and define human rights laws as they apply to state and local government. The act prohibits discrimination in state and local governmental employment, services, and funding on grounds of race, color, religion, creed, political ideas, sex, age, marital status, physical or

mental handicap, or national origin. The Fair Practices Act also charges the commission with enforcement of these statutes and provides a continuing program of education and review to assure that all state and local governmental agencies comply with Montana's anti-discrimination laws.

COMMISSION OPERATIONS

Structure

The Commission for Human Rights (hereinafter referred to as the commission) consists of five members appointed by the Governor. The commission is designated a quasi-judicial board. Appointments to the commission are for four-year terms and are subject to Senate confirmation. The only membership requirement is that at least one member shall be an attorney licensed to practice law in Montana. The Governor designates the chairman who may make and second motions and vote.

The commission is required by law to meet a minimum of four times a year to hear and act upon complaints of discrimination. The commission met seven times during fiscal year 1978-79. Members who are not full-time salaried officers or employees of the state or political subdivisions receive \$25 per day compensation plus travel expenses as provided by state law. (The Legislative Audit Committee has recommended that compensation be set at \$30 per day for members of all boards/agencies being reviewed under the "sunset law".)

Members who are full-time salaried officers or employees of the state or political subdivisions do not receive compensation but receive travel expenses as provided by state law.

Staffing

The commission is attached to the Department of Labor and Industry for administrative purposes. The commission is autonomous in decision-making functions and hires the staff of the Human Rights Division (hereinafter referred to as the division) which carries out commission policies. The commission may seek and receive private and federal funds in its own name and may determine all matters of policy concerning the use of its budget.

The division is authorized a staff of eight full-time equivalents (FTE's): one administrator, one attorney, three investigators (compliance Officer II), one intake officer (compliance Officer I), one secretary III, and one secretary I.

The division presently has a staff of 6.75 FTE's. The reduction from 8.0 FTE results from the division employing only 2.75 FTE investigators and combining the secretary I and intake positions to one FTE. The staff was reduced for budgetary reasons.

Funding

The commission and division are funded by a state General Fund appropriation and federal funds from the

Equal Employment Opportunity Commission (EEOC). In past years the commission has received Comprehensive Employment and Training Act (CETA) moneys through the Governor's Employment and Training council, and Public Service Employment (PSE) funds. The commission does not charge individuals for any services provided.

Illustration 1 is a summary of appropriations, expenditures, and reversions for the last six fiscal years. Part of the "reversions" in federal funds result from the commission not receiving federal contracts equal to the amount of appropriations granted by the Legislature. Additionally, budget amendments were received for amounts equal to federal contracts based on the federal fiscal year ending September 30. "Reversions" are the unexpended balance of those contracts as of June 30.

COMMISSION FOR HUMAN RIGHTS
FINANCIAL HISTORY

<u>Fiscal Year</u>		<u>General Fund</u>	<u>Federal Funds</u>	<u>Total</u>
1979-80	Appropriations	\$67,689	\$111,844 ²	\$179,533
	Expenditures	<u>66,900</u>	<u>106,834</u> ³	<u>173,734</u>
	Reversions	\$ 789	\$ 5,010	\$ 5,799
1978-79	Appropriations	\$107,142	\$114,627 ¹	\$221,769
	Expenditures	<u>102,295</u>	<u>111,099</u> ²	<u>213,394</u>
	Reversions	\$ 4,847	\$ 3,528 ³	\$ 8,375
1977-78	Appropriations	\$107,333	\$111,610 ¹	\$218,943
	Expenditures	<u>106,933</u>	<u>87,630</u> ²	<u>194,563</u>
	Reversions	\$ 400	\$ 23,980 ³	\$ 24,380
1976-77	Appropriations	\$95,447	\$113,407 ¹	\$208,854
	Expenditures	<u>95,426</u>	<u>86,334</u> ²	<u>181,760</u>
	Reversions	\$ 21	\$ 27,073 ³	\$ 27,094
1975-76	Appropriations	\$91,988	\$76,685 ¹	\$168,673
	Expenditures	<u>91,988</u>	<u>44,827</u> ²	<u>136,815</u>
	Reversions	\$ -0-	\$31,858 ³	\$ 31,858
1974-75	Appropriations	\$62,353	\$19,513	\$81,866
	Expenditures	<u>52,506</u>	<u>14,617</u> ³	<u>67,123</u>
	Reversions	\$ 9,847	\$ 4,896	\$14,743

¹ Includes budget amendments.

² Includes prior year expenditures, adjustments, and accruals.

³ Reversions of federal funds are reversions of spending authority and not actual cash.

Source: Compiled by the Office of the Legislative Auditor from Department of Labor and Industry records.

Illustration 1

COMMISSION GOALS AND OBJECTIVES

The sunset law requires each agency under review to define its goal and objectives. The commission defined its goal as being:

--To enforce the Equal Opportunity laws of the state of Montana.

Based on the preceding goal, the commission listed several objectives as follows:

- To investigate and make determinations in 200 cases per year.
- To contract for hearing officers for 50 hearings per year.
- To hold at least four commission meetings per year.
- To respond to some 1,200 business inquiries.
- To provide educational and informational programs to client groups and businesses.

In addition, the commission indicated several objectives based on proposed program modifications. These objectives are subject to the level of funding provided.

COMMISSION/DIVISION FUNCTIONS

The commission/division has four broad functions that aim at the eventual elimination of discrimination in Montana:

- Receive, investigate, conciliate, and when necessary hold hearings and issue orders on discrimination complaints.
- Issue declaratory rulings which clarify the coverage of the Human Rights Act.
- Develop public education programs to help prevent violations through ignorance of the law.
- Administer the Fair Practices Act through enforcement and education programs for state and local government agencies, and receive complaints of violations of the act.

Discrimination Complaints

The Human Rights Act directs the commission to enforce the anti-discrimination provisions of the act.

Persons claiming to be aggrieved by any discriminatory practice prohibited by the act may file a complaint with the commission. The commission's procedure to adjudicate a complaint is an administrative procedure, not a criminal one. A complaint under the Human Rights Act must be filed within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. A complaint under the Fair Practices Act does not have a specified statute of limitations. This is discussed further in Chapter V.

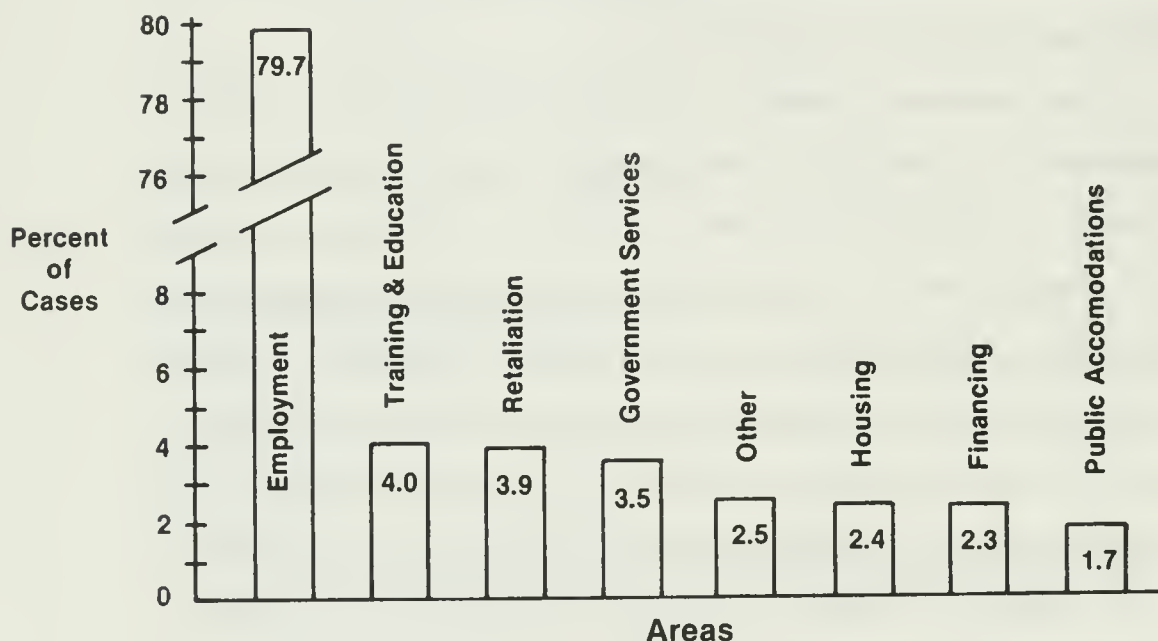
Any person, agency, or organization may file a complaint on behalf of any person claiming to be aggrieved. The division administrator may file a case in like manner when a discriminatory practice comes to his attention. The division has filed a total of 7 cases out of the 1,368 cases recorded as of June 30, 1980. The last case filed by the division was in August 1977. In addition, a complaint may be filed by or on behalf of an aggrieved person alleging that the respondent (person charged in the complaint) engaged in a practice which discriminates against a class of persons in violation of the act (called a class action).

Areas and Causes of Discrimination

The division organizes cases by fiscal year, area of discrimination, and cause of discrimination. Areas and causes of discrimination are given in the Human Rights Act. Areas of discrimination are where the

discrimination occurred; for example, on the job (employment) or when obtaining a loan (financial). Causes of discrimination are why a person was discriminated against; for example, because of their sex or age. Illustration 2 shows that the most common area of discrimination for cases recorded through June 30, 1980 is in employment, at 79.7 percent of the cases.

AREAS OF DISCRIMINATION

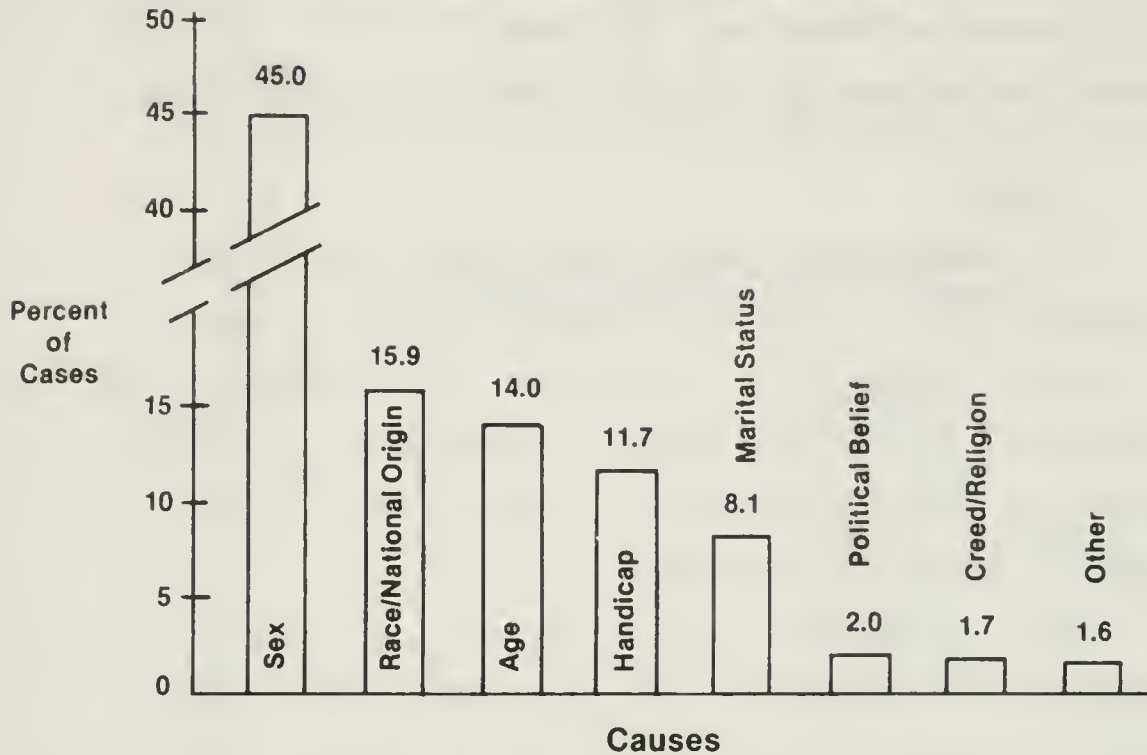


SOURCE: Compiled by the Office of the Legislative Auditor from division records.

Illustration 2

Illustration 3 shows that allegations of sex discrimination constitute 45.0 percent of the cases recorded through June 30, 1980.

CAUSES OF DISCRIMINATION



SOURCE: Compiled by the Office of the Legislative Auditor from division records.

Illustration 3

Complaint Process

The division generally follows the procedures given below when receiving, investigating and resolving complaints:

- Complaint is received at the division.
- Complaint form is finalized.
- Complaint is assigned to an investigator.
- Complaint goes to a fact finding conference to attempt to reach an informal settlement.
- A finding is issued.
- Division attempts to reach a conciliated settlement.

--Contested case hearing is held.

--Commission issues its final order.

(Note: Complaints are closed at various stages, with very few going through the entire process.)

Intake

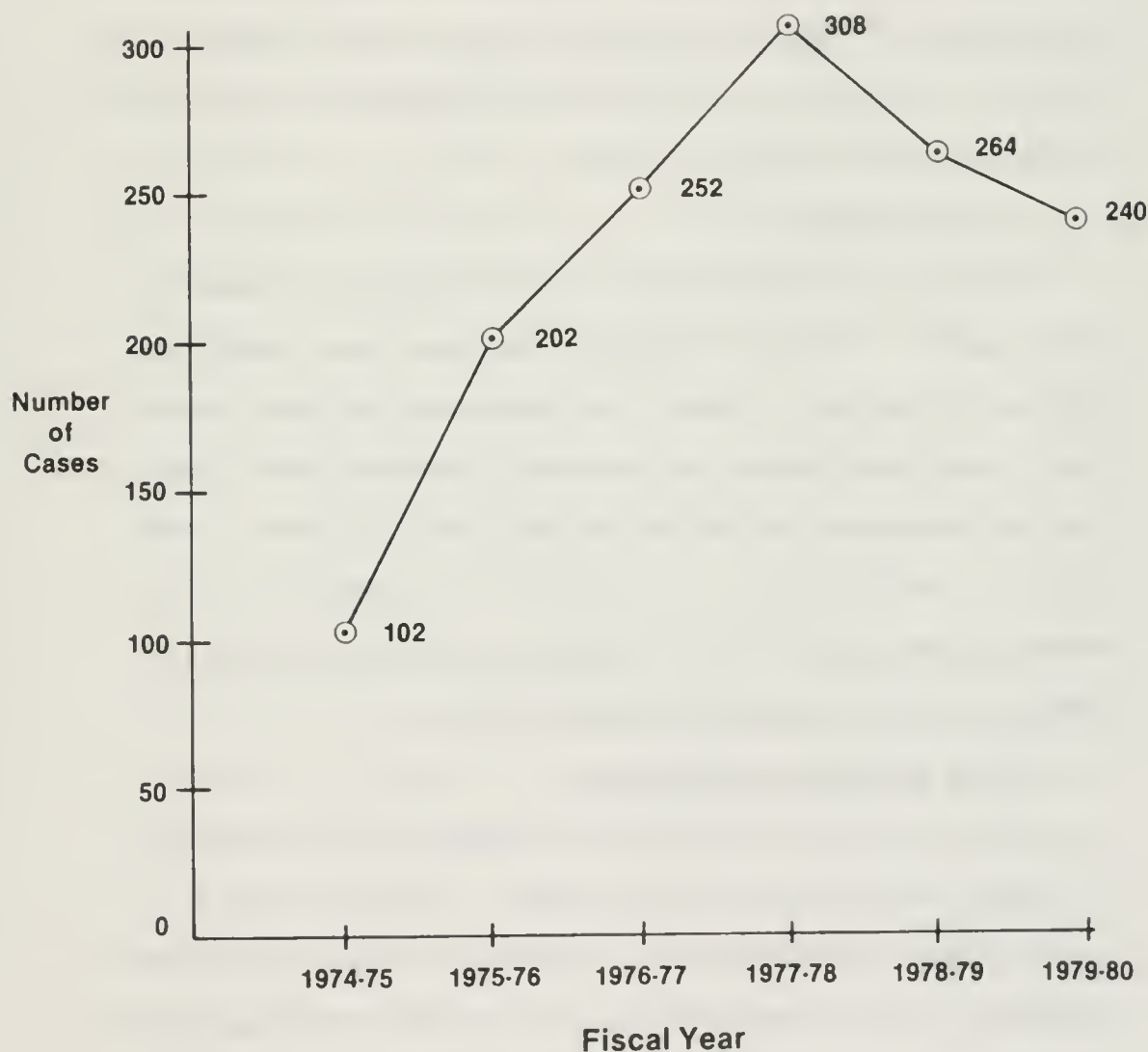
The complaint process begins with the intake procedure. A division staff member answers telephone or written requests for information on discriminatory practices. The intake person screens the call and mails the party a preliminary inquiry form if the complaint appears well founded.

The preliminary inquiry form and any additional information collected is used to determine if a formal complaint form should be drafted and mailed to the complainant (charging party). Allegations must be specific and in most cases the charging party must specify someone who received different treatment than they received. Frivolous complaints are discouraged. The goal is to establish a prima facie case of discrimination.

The division received approximately 1,300 inquiries in fiscal year 1977-78 when the intake process was first developed. Inquiries were projected to increase to approximately 2,000 in fiscal year 1979-80. The intake process has resulted in a leveling off of the number of discrimination cases despite the increase

in the number of discrimination inquiries. Illustration 4 shows there were 308 discrimination cases opened in fiscal year 1977-78 (the first year of intake) and that only 240 were opened in fiscal year 1979-80.

**NUMBER OF DISCRIMINATION CASES
FOR FISCAL YEARS 1974-75 TO 1979-80**



SOURCE: Compiled by the Office of the Legislative Auditor from division records.

Illustration 4

Complaint Form

Charging parties must sign and have notarized the completed complaint form. Charging parties must also sign and have notarized a release form which allows an investigator access to any documents or records that may be required in the course of the investigation. Both of these forms must be returned to the division where they are logged in and assigned a case number. A case file is then set up and the respondent is notified and sent a copy of the complaint.

Investigation

Cases are assigned to investigators. Investigative powers of the division include the power to subpoena witnesses, take the testimony of any person under oath, administer oaths, and require the production of tangible evidence relating to the case. The division administrator indicated that most of the investigative work of the division is done in Helena by telephone and by using correspondence.

Fact Finding Conference

If a complaint involves a simple fact situation and both parties mutually agree to meet in a fact-finding conference, the complaint may be resolved informally. The conference is intended to define and clarify the issues, obtain evidence, and attempt a resolution of the case. Such a procedure reduces the

amount of required field investigation and results in more timely conclusion of complaints. The conference is not a hearing but an informal meeting with a division staff member acting as a mediator. Each party has an opportunity to present the facts as they see them and suggest an acceptable resolution.

A Finding

The final goal of the fact-finding conference is to reach a negotiated no-fault settlement. If no settlement is reached, the investigator will analyze the information and draft a finding that there is or is not reasonable cause to credit the allegations of the complaint. If a finding cannot be made, then additional information will be collected by the investigator. The division attorney and administrator must concur in a finding of reasonable cause before it becomes effective.

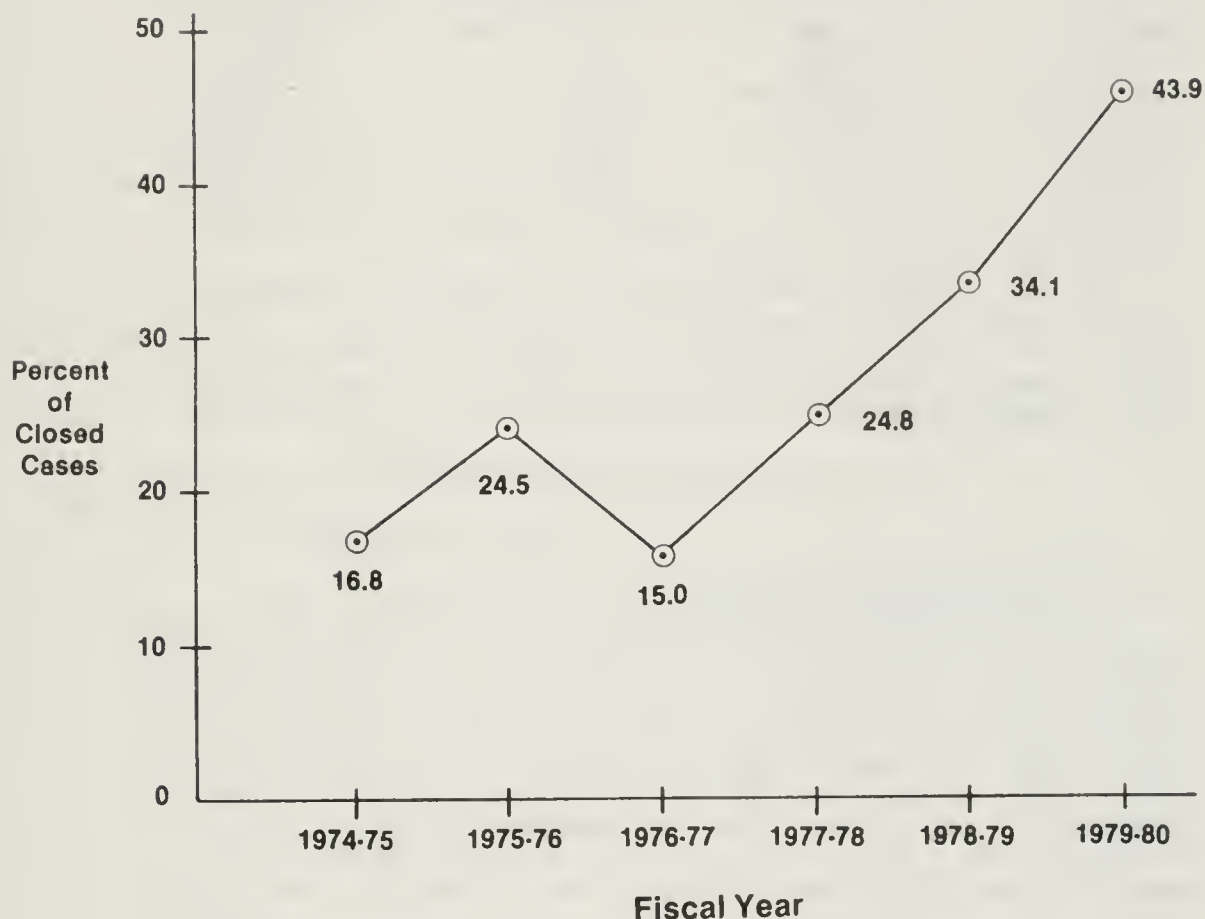
If a finding of no cause is made by the division then notice is given to all parties. Charging parties are given a chance to appear at an informal conference with the division administrator if they wish to appeal. The charging party can appeal the division administrator's determination at a no cause hearing before the commission or before a hearing examiner designated by the commission. All no cause findings must be affirmed by the commission. This completes the administrative process.

Conciliation

If the division finds reasonable cause, then the staff tries to obtain a conciliation agreement between the two parties. Conciliation agreements define a solution to the complaint, with both parties accepting the settlement. Conciliation settlements are no-fault agreements and must be reduced to writing and signed by both parties. These settlements may contain any remedy which could have been ordered by the commission after hearing (see pages 19 and 20). No conciliation agreement is binding until it is approved by the division administrator, and confirmed by the commission.

Illustration 5 shows that the percentage of informal and conciliated settlements have been increasing since fiscal year 1976-77. This increase is partially due to more emphasis on these types of settlements and the intake process, which screens out cases without merit. Conciliated and informal settlements speed up the complaint process and provide more timely resolutions.

**PERCENT OF CASES RECEIVING
CONCILIATED OR INFORMAL SETTLEMENTS
FOR FISCAL YEARS 1974-75 TO 1979-80**



SOURCE: Compiled by the Office of the Legislative Auditor from division records.

Illustration 5

The increase in informal and conciliated settlements has also contributed to a reduction in the average cost per completed case as shown in Illustration 6.

AVERAGE COST PER COMPLETED CASE
FOR FISCAL YEARS 1974-75 TO 1979-80

<u>Fiscal Year</u>	<u>Expenditures</u>	<u>Cases Completed</u>	<u>Average Cost/ Completed Case</u>
1974-75	\$ 67,123 ¹	51	\$1,316
1975-76	136,815 ¹	87	1,573
1976-77	181,760 ¹	136	1,336
1977-78	194,563 ²	268	726
1978-79	213,394 ¹	211	1,011
1979-80	173,734	248	701

¹ Includes CETA funds.

² Division had 4 VISTA personnel at no cost.

Source: Compiled by the Office of the Legislative Auditor from division records.

Illustration 6

Contested Case Hearing

When it appears to the division administrator that a conciliated settlement is not reasonably possible, he will inform all parties that the conciliation period is concluded. If no request to re-open conciliation is made the division administrator will certify the case to the commission for hearing. The vast majority of the cases are closed through informal or conciliation settlements and other methods before they reach the hearing stage. Since the creation of the commission, only 31 of the 1,001 closed cases have gone through a hearing (as of June 30, 1980).

Contested case hearings are normally heard before a hearing examiner in the county where the unlawful conduct is alleged to have occurred. The commission generally contracts for hearing examiners through the

Legal Services Division of the Department of Justice. Other attorneys are used as hearing examiners where there might be a conflict of interest.

Hearing examiners hear testimony by all parties, under oath, and collect any exhibits, documents, or other tangible evidence. At the conclusion of the hearing, the hearing examiner writes a proposed order, including findings of fact and conclusions of law. All parties who are affected by the proposed order have an opportunity to file exceptions, present briefs, and make oral arguments before the commission.

Commission Order

The commission issues the final decision or order after reviewing the hearing examiner's proposed order and any additional information supplied by the parties or the division. Either party can appeal the final order of the commission to the appropriate district court.

If the commission finds that the respondent has engaged in a discriminatory practice, the commission orders the respondent to refrain from engaging in the discriminatory conduct. The order may:

- Prescribe conditions on the respondent's future conduct relevant to the type of discriminatory practice found;
- Require any reasonable measure to correct the discriminatory practice and to rectify any harm (including monetary settlements) to the person discriminated against;
- Require a report on the manner of compliance.

While the commission may order backpay settlements it cannot require the payment of any punitive damages. If the commission order is not obeyed, the division has the responsibility to petition the appropriate district court to enforce the commission's order by injunction. If the commission finds that the respondent did not engage in a discriminatory practice the commission issues an order dismissing the complaint.

The following is a summary of the 31 commission orders issued through June 30, 1980:

- In 13 cases the commission found that the respondent discriminated against the charging party and awarded a monetary settlement. (The settlements totalled \$89,537.)
- In one case the commission found in favor of the charging party but did not award a monetary settlement.
- In 17 cases the commission found the respondent did not discriminate against the charging party and the cases were dismissed.

Declaratory Rulings

Declaratory rulings may be issued by the commission when a party petitions for a ruling on the applicability of a statute or regulation to the affected person's activity or proposed activity. Declaratory rulings are covered specifically in the Human Rights Act under section 49-2-401, MCA. Here the petitioner would be seeking an exemption from one or more of the provisions which prohibit discriminatory practices. If the commission finds that reasonable grounds for granting an exemption exist, it may issue a ruling exempting

the petitioner from the particular provision. Any grounds urged as a "reasonable" basis for an exemption must be strictly construed.

If the commission intends to consider a party's petition and issue a ruling, a hearing similar to a contested case hearing is held. After considering testimony and any documents, etc., presented at the hearing, the commission issues its ruling.

The commission has issued a total of four declaratory rulings, two in fiscal year 1976-77 and one each in fiscal years 1977-78 and 1979-80. In three of the declaratory rulings, the petitioner was seeking to have the commission determine if certain statutes were applicable to some existing activities. The fourth declaratory ruling involved a request for an exemption of an apprenticeship program from the provision of the law that prohibits discrimination based on age. The commission ruled that reasonable grounds existed and the exemption was granted. The division administrator stated that the commission has not received more petitions for rulings because most people probably do not know about the process. These rulings are discussed further in Chapter V.

Education and Outreach Programs

Division officials believe that to fulfill its legislative mandate, an outreach program to inform citizens of Montana's civil rights laws and commission

activities is necessary. The division recommends that 10 percent of staff time be devoted to these services.

During fiscal years 1977-78 and 1978-79 the division performed the following educational and outreach activities:

- 54 radio and 55 television public service announcements were taped and used;
- The division administrator was interviewed 9 times on radio and 7 times on television;
- 22 press releases were prepared;
- The Business Rights Line, a service instituted so employers can call the division requesting information on discriminatory employment practices, received approximately 240 inquiries; and
- Approximately 4,000 people were reached through speeches, workshops, and seminars.

The division administrator has set a goal of a minimum of two outside contacts per month through such activities as workshops. He believes that this type of work increases the activity of the Business Rights Line. Approximately 250 inquiries were received in fiscal year 1979-80. The division's education and outreach work will be discussed further in Chapter V.

Fair Practices Act

The Fair Practices Act was passed by the 1975 Legislature with responsibility for enforcement delegated to the commission. Implementation of this act calls for the commission to:

- Adopt regulations for inclusion in the Administrative Rules of Montana;

- Develop programs for the purpose of broadening the base of job recruitment by government agencies;
- Provide enforcement and educational programs for state and local governmental agencies; and
- Process complaints of violations of this act.

The division has set implementation of the Fair Practices Act as a low priority function. In 1978 the commission voted to request five positions for implementation of the Act. The funding for these positions was not provided. Subsequently, the commission has done minimal work in the area. The division only assists state and local agencies when requests are made for education and enforcement programs or technical assistance. For example, the division has given limited assistance to the EEO Coordinator of the Department of Administration on the development of affirmative action plans for state agencies.

Chapter III

OTHER ORGANIZATIONS

There are various government agencies and private organizations which provide human rights services and support to the residents of Montana. The following is a summary of the services these agencies and organizations provide to Montana's citizens.

FEDERAL AGENCIES

The importance of state human rights agencies has increased in recent years due to the growing tendency of federal agencies to let the states process discrimination complaints. Federal agencies set up systems which allow state human rights agencies a specified period of time to resolve allegations of discrimination under their laws, before the federal government takes action. In Montana the commission is the principal state agency for enforcing the state's comprehensive laws against discrimination.

Various federal agencies enforce anti-discrimination laws that are associated with their regulatory functions. These agencies, along with their areas of enforcement, are detailed below. Historically, federal agencies enforcing anti-discrimination laws have not played a significant role in Montana, except for the Equal Employment Opportunity Commission (EEOC).

Equal Employment Opportunity Commission

The EEOC enforces Title VII of the Civil Rights Act of 1964 which prohibits most employers from discriminating on the basis of race, color, religion, sex, and national origin. Its jurisdiction covers all private concerns that employ 15 or more persons, including state and local governments. Through a contractual agreement with the EEOC, the commission acts on its own authority as an agent of the EEOC to investigate and settle discrimination charges.

The agreement with EEOC provides that where state law prohibits discriminatory practices and authorizes the commission to grant relief, EEOC will take no action for 60 days after commission proceedings have begun. On the 61st day EEOC may invoke its power to investigate the charge to determine whether reasonable cause exists and begins its compliance activity. Title VII mandates that EEOC find reasonable cause to support a charge before it attempts conciliation. Thus, the EEOC must accord substantial weight to the final findings made by the commission. EEOC has set aside a certain amount of funding for the commission to process Title VII cases. For federal fiscal year 1980, the commission has available funding to process 175 Title VII cases at \$350 per case.

EEOC also has a significant effect on the operations of Montana government in the area of affirmative

action. It has the authority to require all Montana private employers and state government departments covered by Title VII to submit annual reports concerning implementation of their affirmative action programs. These reports provide EEOC with information on the composition of their work forces by occupational category, broken down by race, sex, and national origin.

Other Federal Agencies

The commission has no formal agreements with federal agencies other than the EEOC. The commission has only limited contact with other major federal agencies.

The Department of Housing and Urban Development (HUD) has the responsibility for enforcing equal housing opportunity under Title VIII of the Civil Rights Act of 1968. The commission has attempted to obtain "substantially equivalent" status with HUD. "Substantially equivalent" means that the state law provides rights and remedies for alleged discriminatory housing practices that are essentially the same as those provided under Title VIII.

The Office of Revenue Sharing (ORS) is the federal agency with the authority to assure non-discrimination in the annual distribution of General Revenue Sharing funds. The commission has attempted to establish a relationship with ORS, but no formal agreement was ever reached.

Other federal agencies have had little or no effect on the operation of the commission. Therefore, federal agency influence on the commission and the anti-discrimination policies of Montana is provided almost exclusively by the EEOC.

STATE AGENCIES

State government agencies other than the commission participate in the elimination of discrimination in Montana. All state agencies are required by federal law to adopt affirmative action programs and to report regularly on agency progress in employing women and minority persons. However, only the commission and the Department of Labor and Industry are given the authority to enforce compliance with Montana anti-discrimination laws.

The Department of Labor and Industry's Labor Standards Division is charged with enforcing various state and federal labor laws, overseeing apprenticeship and on-the-job training programs in Montana, and working for the elimination of employment barriers to women. At present, both the Labor Standards Division and the commission have jurisdiction to handle cases involving equal pay and maternity leave.

The Women's Bureau of the Labor Standards Division is concerned with discrimination in Montana that would prevent women from contributing to society according to their fullest possible potential. The bureau writes

and distributes educational materials to increase awareness of discrimination against women and especially to remove employment barriers for women. Regarding specific discrimination cases, the bureau provides counseling for women desiring to file sex discrimination complaints.

The Department of Administration has considerable influence on the non-discrimination policies of Montana government and maintains close contact with the commission. The Department of Administration is charged by Executive Order with establishing an effective statewide affirmative action plan. The Department of Administration also provides guidance to agency managers in complying with Affirmative Action. The Employee Relations Bureau of the Department of Administration is also developing a computerized EEO analysis system for the state which will allow rapid assessment of women and minority employment and the employment deficiencies existing in state government. Further, the Merit System Council may hold hearings on discrimination cases as stipulated by Council rules, but no determinations have yet been made under this provision.

Grievance Procedures

All state agencies, including those previously mentioned, have internal grievance procedures to resolve discrimination cases at the department level.

Most departments follow a process similar to the state's recommended grievance procedure established by the Department of Administration in the Montana Operations Manual (MOM). Any employee may initiate a complaint if he/she feels the application or interpretation of personnel policies resulted in discrimination. The MOM encourages that complaints be resolved at the lowest possible management level. Usually, the complainant meets with his/her immediate supervisor and/or EEO officer in an informal hearing. If there is no resolution, the employee has the right to follow a formal procedure and meet with the department director. The employee always retains the right to eliminate all grievance procedures and appeal immediately to the Commission for Human Rights.

Many private firms also have grievance procedures usually detailed in union contracts or company policies. These procedures are intended to solve as many complaints at the company level as possible before they go to government agencies or the court system.

ORGANIZATIONS

Various organizations exist to represent the interests of minorities and women in Montana. These groups follow and support human rights legislation and seek enforcement of civil rights laws. These organizations often refer people with discrimination complaints to administrative agencies and some provide legal assistance.

During our review of the commission, we interviewed members of some of these groups which included:

- American Civil Liberties Union of Montana.
- Montana United Indian Association.
- Montana Women's Political Caucus.
- Montana Chapter, National Association of Social Workers.
- Indian Development and Education Alliance.
- Montana Coalition of Handicapped Individuals.

These groups support the work of the commission and have expressed the opinion that the commission should be continued.

Chapter IV

OTHER STATES

All states except Alabama, Louisiana, and Mississippi have an agency that administers at least some aspect of the state's laws that prohibit discrimination. In addition, the District of Columbia, Puerto Rico, and the Virgin Islands have agencies similar to the states' agencies.

Some of the agencies are quite different from the Montana Commission for Human Rights. Some, such as the Georgia Office of Fair Employment Practices only cover discrimination in employment. Others, such as the Vermont Commission on Human Resources do not take into account as many causes of discrimination as are provided for under Montana's law. Vermont does not consider discrimination based on marital status, age, physical or mental handicap, or political ideas. There are four agencies that are considered as advisory only in that they have limited investigative powers and cannot enforce the law.

Illustration 7 compares the Montana Commission for Human Rights with the agencies in other states and the District of Columbia.

OTHER STATES COMPARED TO MONTANA

<u>Facet</u>	<u>United States</u> ¹	<u>Montana</u>
Autonomy	32 Independent 16 Dependent 3 No Agency	Independent
EEOC 706 Status	43	Yes
1980 EEOC Contract Cases	3 0-100 13 101-300 9 301-500 8 501-1000 10 over 1000	175
Areas of Discrimination	44 Employment	Yes
Covered by Law ²	36 Housing	Yes
Causes of Discrimination	46 Race/National Origin	Yes
Covered by Law ³	45 Religion 45 Sex 38 Age 33 Handicap 24 Marital Status	Yes Yes Yes Yes Yes
Agency Powers	39 Subpoena Powers 33 Can Order Backpay	Yes Yes

¹ Includes the District of Columbia.

² Information not available for other areas.

³ Normally a cause does not cover all areas.

Source: Compiled by the Office of the Legislative Auditor.

Illustration 7

The above illustration shows that 32 agencies, or 60 percent, are independent, meaning that they are not under the direct control of a department of state government. Forty-three of the 48 agencies, including Montana's commission, have "706 status" with the Equal

Employment Opportunity Commission (EEOC). Agencies with "706 status" have agreed to investigate employment discrimination cases for the EEOC and are reimbursed at \$350 per case. The EEOC also has agreements with 42 county and city human rights agencies and with agencies in Puerto Rico and the Virgin Islands. The number of cases that each agency has contracted to do for the EEOC gives some indication of the number of discrimination complaints the agency plans to investigate in federal fiscal year 1980. Montana contracted for 175 cases while 10 states contracted for over 1,000 cases each. Overall, the EEOC accepted contracts with 68 agencies for 39,540 cases.

Most states prohibit discrimination in employment and housing. Information was not readily available for the coverage of the other areas of discrimination. The Montana Human Rights Act prohibits discrimination in government services, education, public accommodations, and financing, in addition to employment and housing. The Fair Practices Act prohibits discrimination by state or local governmental agencies in employment, services, and funding.

Almost all states include race/national origin, religion, and sex as causes for discrimination charges. It is common for states to vary the causes of discrimination for the various areas. For example, age may only be used as a cause for employment discrimination, or marital status may be used for a

cause in all areas except employment. Montana's law is fairly uniform in this aspect except marital status does not apply to discrimination in housing or public accommodations. Montana's law also includes political ideas as a cause of discrimination for the areas of state or local government employment, services, or funding.

Chapter V

AREAS FOR LEGISLATIVE CONSIDERATION

In previous sunset reviews of agencies in Montana, the design and effectiveness of certain aspects of the agency operations have warranted legislative consideration. The intent of the following sections is to briefly discuss these aspects as they apply to the Commission for Human Rights.

1. Effect of Commission Termination
2. Overlapping Authority
3. Low Priority Functions
4. Pending Cases
5. Agreements with Federal Agencies
6. Legislative Intent
7. Commission Voting
8. Recording Declaratory Rulings

EFFECT OF COMMISSION TERMINATION

If the commission were terminated several things could occur. The following section is a discussion of what might happen and the pros and cons of their occurrence.

There are no federal laws that require the states to have human rights commissions, although all but three states have such an agency. If the Montana commission were terminated, agencies and certain private employers would still be required to make federal equal employment opportunity reports and follow federal affirmative action guidelines. These requirements are

not enforced by the commission. The Human Rights Act and the Fair Practices Act are the only state laws that require a human rights commission.

Termination of the commission would not have any effect on federal funding, except for the EEOC funds received directly by the commission. Any state agency or political subdivision that receives federal funds would be responsible for complying with the required nondiscrimination provisions common to all such funding.

Termination of the commission would require federal agencies, such as the EEOC, to investigate more discrimination cases in Montana. Some cases presently covered by Montana's laws are not covered by federal laws and these would not be investigated by federal agencies; for example, discrimination complaints against employers with fewer than 15 employees. A Department of Labor and Industry report indicated that approximately 80 percent of private employers in Montana had nine or less employees in March 1979. Another consideration is that people may be less likely to contact agencies in Denver or the District of Columbia. Processing cases from these greater distances is likely to be more costly and take more time to settle.

If the commission were terminated, state agencies would still have their internal grievance procedures that could process some discrimination complaints

brought by their employees. The Department of Labor and Industry (Labor Standards Division) could manage some of the discrimination cases from the public (they presently can hear equal wage and maternity cases) while the Personnel Appeals Division could take complaints from state employees. An agency, such as the State Personnel Division of the Department of Administration, could assume some of the education and outreach work of the commission, but they presently only reach state agencies and not the public. For any agency to take on added functions would normally require additional funding. There is no reason to believe that dispersing the commission's functions among other state agencies would provide better service or cost savings for the state.

OVERLAPPING AUTHORITY

Present statutes give the Labor Standards Division of the Department of Labor and Industry the authority to enforce the Equal Pay Act (section 39-3-104, MCA) and the Maternity Leave Act (Title 39, Chapter 7, Part 2, MCA). The Equal Pay Act makes it unlawful to pay women less than men for equivalent service. The Maternity Leave Act requires employers to grant employees a reasonable leave of absence for pregnancy. The commission also has jurisdiction to resolve maternity leave and equal pay cases by making sex discrimination determinations on such complaints.

The Equal Pay Act does not provide for job protection or backpay settlements for the complainant. Previously, the Labor Standards Division referred these cases to the U.S. Department of Labor. The EEOC received authority over the federal Equal Pay Act in July, 1979. Since then, the Labor Standards Division has referred all equal pay cases to the Commission for Human Rights because of the deferral agreement between the commission and the EEOC.

The Maternity Leave Act is a very comprehensive act that provides for job protection and backpay settlements for the complainant. Due to overlap between subject matters of the Maternity Leave Act and the Human Rights Act, complainants are told they can file with both the Labor Standards Division and the commission. This was the subject of an informal agreement made in February of 1978 between the Labor Standards Division and the commission. The administrators of both the Labor Standards Division and the Human Rights Division have expressed their desire to process maternity cases. The Labor Standards Division received a total of 14 maternity cases from July 1, 1978 to June 30, 1980. The Human Rights Commission received a total of 23 maternity cases during the same period. Maternity cases received by the EEOC are referred to the commission as part of their contractual agreement.

Work of the Women's Bureau of the Labor Standards Division involves efforts to eliminate sex discrimination, especially by increasing public awareness about discrimination against women in employment. The commission is also involved with education programs designed to inform Montana's citizens of their civil rights and to prevent discrimination through ignorance of the law. It should be noted that the bureau provides a variety of services to women, acting as an information and counseling service and also publishing many educational materials.

Consideration should be given to consolidating the authority to process equal pay and maternity cases with one agency. Also, education and outreach work concerning discrimination may be more effective if a single agency were made responsible for program administration.

LOW PRIORITY FUNCTIONS

Some of the functions described in the Human Rights Act and the Fair Practices Act are given lower priority by the commission. Those functions that have not been completely fulfilled are discussed below.

Fair Practices Act

The commission/division functions required by the Fair Practices Act were covered in Chapter II. Basically these functions are:

--To develop programs for the purpose of broadening the base of job recruitment by state agencies.

--To develop enforcement and education programs for state and local governments.

A related function (also required by the Human Rights Act) calls for the commission to make potential charging parties and respondents aware of the civil rights laws of Montana, available assistance, and the work of the commission.

The division has not done extensive work in the areas mentioned above. In planning for the 1981 bien-nium the division labeled these functions as support services (low priority) and allocated ten percent of staff time to them.

In previous years the division has done some education and outreach work both for the business community and for local governments. The division administrator said that most of this was accomplished using CETA personnel in fiscal years 1976-77 and 1978-79. VISTA personnel performed many of these functions in fiscal year 1977-78. The division administrator also did education and outreach work during the above fiscal years. Presently, he is the only person available to perform these functions.

Due to a change in policy at the federal level, VISTA personnel are no longer available for the commission. There is some possibility of obtaining CETA funding, but this would be for a secretarial position rather than an education and outreach position.

Presently, the only education and outreach programs performed by the commission/division are when employers call the division on the Business Rights Line and when there are public contacts by division employees and commission members.

Human Rights Act

There are three functions of the Human Rights Act that the commission/division is not performing to any great extent. These are permissible and not required functions:

- To have the division bring cases in its own name when a discriminatory practice comes to its attention.
- To have the division attorney represent charging parties at contested case hearings.
- To have the commission defray the expenses of an indigent party in a contested case hearing.

Section 49-2-501(1), MCA, allows the division to file a complaint when a discriminatory practice comes to its attention. In the past, the division has brought 7 cases listing itself as charging party, with the last one being in August 1977. Presently, commission members have a policy of not seeking out discrimination cases. Division staff members are only processing complaints submitted by the public.

The division attorney can represent charging parties in contested cases before the commission according to section 49-2-505(2), MCA. When the commission first started processing discrimination complaints,

almost all charging parties who had cases go to contested case hearings were represented by the division attorney. A total of 15 charging parties have been represented by the division attorney with the last one being in March 1979. The division administrator feels that 20 cases a year may be administratively closed because the charging party fails to obtain an attorney after the case has been certified for hearing. Some commission members feel that the division attorney should represent more charging parties but this is not done at this time.

The 1979 Legislature attempted to provide relief for the legal costs of the prevailing party in contested case hearings before the commission. Section 49-2-505(4), MCA, states:

The prevailing party in a hearing under this section may bring an action in district court for attorney's fees. The court in its discretion may allow the prevailing party reasonable attorney's fees.

The division administrator said that to his knowledge this section of the law has never been used.

Section 49-2-505(3), MCA, allows the commission to defray the expenses of an indigent party in a contested case hearing. This provision has not been used by the commission although an offer was made to one charging party at the May 13, 1980 commission meeting. There have not been any other requests for the commission to defray a person's expenses.

PENDING CASES

The division has emphasized informal and conciliated settlements to speed up the complaint process and provide more timely resolutions. Even with this emphasis the number of pending cases continues to increase. There were 367 cases pending as of June 30, 1980 as shown in Illustration 8. Of these, 20 are in litigation and 113 are against two respondents and are expected to be litigated.

PENDING CASES FOR FISCAL YEARS 1974-75 TO 1979-80

<u>Fiscal Year</u>	<u>Cases Received</u>	<u>Cases Completed Each Fiscal Year</u>	<u>Total Cases Completed (As of 6/30/80)</u>	<u>Pending Cases</u>
1974-75	102	51	101	1
1975-76	202	87	184	18
1976-77	252	136	226	26
1977-78	308	268	254	54
1978-79	264	211	138	126
1979-80	240	248	98	142
Total	1,368	1,001	1,001	367

Source: Compiled by the Office of the Legislative Auditor from division records.

Illustration 8

The division should develop procedures to reduce the number of pending cases.

AGREEMENTS WITH FEDERAL AGENCIES

Present relationships between the commission and federal agencies other than EEOC are informal and have never been established on a permanent basis. For example, the commission has not been able to secure

"substantially equivalent" status with HUD (see Chapter III). Present state statutes prohibiting discrimination in the sale, lease, or rental of housing accommodations do not conform to the language of the Federal Fair Housing Act. This lack of consistency between state and federal law makes the commission ineligible to receive status as a deferral agency and consequently the commission loses federal funding and resources for its state fair housing effort. The May 14, 1980 Federal Register indicated that the minimum contribution from HUD would be \$20,000 if Montana's law was determined to be "substantially equivalent." By amending sections 49-2-101(11) and 49-2-304, MCA, and substituting the appropriate language, Montana laws would conform to federal fair housing laws.

The commission attempted to make the necessary changes in the law through Senate Bill 222 of the 1977 legislative session. The Legislature did not pass the bill. (The division is considering bringing this issue up again before the 1981 Legislature.)

The state may be neglecting potential sources of funding and technical assistance. Consideration should be given to establishing permanent agreements with those federal agencies which could provide Montana with financial and technical resources.

LEGISLATIVE INTENT

The laws administered by the commission are phrased in such a way that the legislative intent is not clear concerning three issues. The confusion arises because the commission administers two acts which contain contrasting language in specific sections. Each act is a separate chapter under Title 49, MCA. The three issues are:

1. Do complaints filed under the Fair Practices Act have the same 180-day statute of limitations as complaints filed under the Human Rights Act?
2. Can a person with a complaint under the Human Rights Act also file in district court or is that option limited to cases filed under the Fair Practices Act?
3. Can respondents to complaints filed under the Human Rights Act use the defense of observing the terms of a bona fide seniority system or employee benefit plan as allowed under the Fair Practices Act?

The first two issues result from section 49-2-501, MCA, of the Human Rights Act and section 49-3-303, MCA, of the Fair Practices Act.

Issue number one arises because the Human Rights Act places a 180-day limit on filing a complaint, ". . . after the alleged unlawful discriminatory practice occurred or was discovered" (section 49-2-501(2), MCA). No such restriction or time limit exists for complaints filed under the Fair Practices Act.

Issue number two results because complainants filing under the Fair Practices Act have the option to

petition the district court for appropriate relief before exhausting remedies through the commission (section 49-3-303(1), MCA). The Human Rights Act does not state whether this option exists for complainants filing under this act. This issue has resulted in at least two court actions.

The final issue presents itself because of section 49-3-103, MCA, of the Fair Practices Act. This section allows respondents of cases filed under the Fair Practices Act to use the defense of following the terms of a bona fide seniority system or employee benefit plan. The Human Rights Act does not state that respondents have that defense available to them. The issue is further complicated by the fact that the above section (a part of the Fair Practices Act) mentions private employers, which are covered by the Human Rights Act. The Fair Practices Act covers government agencies and their contractors.

Since the commission processes complaints under both acts it is reasonable to assume that the same standards should apply to complaints under both acts. The Legislature could eliminate the confusion and litigation over the statutes by clarifying the intent of the statutes.

COMMISSION VOTING

At times the commission must conduct meetings and make decisions with less than all five members present. This is a topic expressly covered by the law. The

commission is designated a quasi-judicial board by section 2-15-1706, MCA. Quasi-judicial boards, according to section 2-15-124(8), MCA, must meet the following requirements when conducting business:

A majority of the membership constitutes a quorum to do business. A favorable vote of at least a majority of all members of a board is required to adopt any resolution, motion, or other decision, unless otherwise provided by law. (Emphasis added.)

The statutory duties of the commission are set forth in Title 49, Chapter 2, MCA. There are no provisions for determining what constitutes a favorable vote by the commission.

Therefore, the commission can conduct business with at least three members present, but three members must vote favorably before the commission can adopt any resolution, motion, or other decision.

At recent meetings the commission has decided that when four members are present, including the chairman, the chairman's vote would not count in the case of a tie. Therefore, if a tie occurred, the decision would be made by a two to one vote. The commission could also have two to one votes when only three members are present for voting. A review of discrimination cases at the division revealed two examples where commission decisions were made by two to one votes. These decisions do not comply with provisions of law requiring a favorable vote from a majority of commission members, and, therefore, are subject to challenge.

RECORDING DECLARATORY RULINGS

Section 2-5-501, MCA, requires that any agency issuing declaratory rulings must file those rulings with the Secretary of State for publication in the register. This provision was added by the 1979 Legislature so only those rulings made after July 1, 1979 have to be filed.

The commission has issued one declaratory ruling, dated December 12, 1979, that falls under the above provision. This ruling was not recorded with the Secretary of State. The division administrator stated that this ruling would be recorded as required.

